

Supreme Court of the United States

October 19, 1943 Term

No. _____

MITCHELL IRRIGATION DISTRICT,
a Corporation,

Petitioner,

vs.

JOHN A. WHITING, JR., Water Commissioner,
District 14, Division 1, State of Wyoming,

Respondent.

PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Mitchell Irrigation District, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Wyoming, being the highest Court of said State, in which a decision in said cause could be had in the above entitled action.

The opinion of the Wyoming Supreme Court was rendered and filed on the 27th day of April, 1943, (See 136 P. (2d) 502) (Rec. 175), and petition for rehearing being duly filed on the 24th day of May, 1943, in the Supreme Court of the State of Wyoming and denied without a hearing under order dated the 12th day of October, 1943, (Rec. 197). The decree of the Wyoming trial court appears Rec. 42.

A

QUESTIONS INVOLVED

1. Whether or not the Wyoming Supreme Court can by judicial decree nullify Article 8, Section 3 of the Constitution of Wyoming, Appendix B, Page 25, by per-

mitting the diversion of water from the North Platte River in Wyoming for beneficial use under Wyoming adjudicated appropriations of water from the North Platte River, an interstate stream, in disregard of the priority right of petitioner guaranteed to it under the Wyoming Constitution and the Constitution of the United States.

2. Whether or not the Wyoming Supreme Court can by judicial decree sanction intentional discrimination against petitioner by refusing to protect the priority of petitioner's water right, acquired under Wyoming Territorial Law and sanctioned by the Act of July 26, 1866, and Desert Land Act of March 3, 1877, authorizing it to divert for beneficial use water in priority order and use the diverted water for irrigation of lands located in Nebraska for which the appropriation was obtained and adjudicated, solely because the water appropriated by petitioner is used to irrigate land located in Nebraska.

3. Whether or not the Wyoming Courts can arbitrarily refuse to enforce the law of priority when such refusal results in an intentional, unjust, and wrongful discrimination against the property right of petitioner, a citizen of Nebraska, and destroys a valuable property right protected under the Constitution of the United States and the Constitution of the State of Wyoming.

B

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions and statutes relied on appear in the Appendix, page 24-6.

C

SUMMARY STATEMENT

Petitioner is an irrigation district organized and existing under the laws of the State of Nebraska, of which state it is a citizen. It owns a water right acquired under Wyoming Territorial Law with priority of June 20, 1890, adjudicated by Wyoming State Board of Control, October 2, 1920, authorizing it to divert and take from the available natural flow of the North Platte River in Wyoming in priority order the quantity of water needed and within a maximum quan-

tity of 194.6 cubic feet per second of time, as fixed in said order of adjudication, and convey the same through its interstate canal, with head gate located approximately one-half mile above the Wyoming-Nebraska boundary line in Wyoming, into the State of Nebraska, where the same for more than fifty consecutive years, immediately prior to August 1, 1940, had been used for the irrigation of crops grown upon the lands comprising the Mitchell Irrigation District, during which period petitioner's water right, including the date of priority, acquired by compliance with Wyoming Territorial Law had been recognized and protected by the State of Wyoming.

Petitioner brought this suit in the District Court of Goshen County, State of Wyoming, to obtain a mandatory injunction requiring the respondent, an administration official of the State of Wyoming, to regulate the diversion and taking of appropriated waters from the available natural flow of the North Platte River, an interstate stream flowing within District 14, Division 1, in Wyoming, in strict priority order of adjudicated appropriations diverting in that area when the available supply was insufficient to meet all demands.

The respondent, a state official acting as the administrative agent of the State of Wyoming, has exclusive jurisdiction over all diversions of appropriated water from the North Platte River in Division 1, District 14, State of Wyoming, within which district and division petitioner diverts. Section 122-303, 304, W. R. S., 1931, Appendix C, pages 25-6, requires that such official divide, regulate, and control the diversion and taking of appropriated water in times of scarcity by all appropriators under the Commissioner's jurisdiction in strict priority order.

Upon the trial of this cause in the District Court, the respondent stated (Rec. 116-17) that he would not enforce the law of priority so far as petitioner's right to divert water from the North Platte River was concerned unless compelled to do so by a court order; the Wyoming Courts refused to issue such order. The action of the respondent was not an error in judgment, nor the result of discretion reasonably exercised, but represented deliberate purposeful action preceded by a conference with the state engineer of the State of Wyoming and the superintendent of Water Division No. 1, (Rec. 83). These two state officials have supervisory authority over the action of all water com-

missioners in Division 1, District 14, in the exercise of their exclusive duty of protecting all adjudicated water rights without discrimination and permitting diversion only in strict order of priority at all times of insufficient water supply; and the state engineer and the superintendent of Water Division No. 1, concurring in the conduct of the respondent, results in a denial to the petitioner of protection to which it is entitled under the Constitution of Wyoming, Article 8, Section 3, see Appendix B, page 25; under the Statutes of Wyoming; and under the Constitution of the United States. These officials have indicated by their acts and conduct that the settled policy of future administration will be to refuse regulation on priority basis for the benefit of petitioner because its irrigated lands are located in the State of Nebraska and because the water diverted by petitioner is not used on Wyoming lands. The respondent purporting to act under state authority has invaded petitioner's right secured by the Federal Constitution.

D

THE QUESTION INVOLVED IS SUBSTANTIAL

The priority of petitioner's water right is the most valuable element of such right. At times when the water from the common source of supply is insufficient to meet the needs of all appropriators dependent thereon, it is only by reason of petitioner's early priority, as there is no unappropriated water in the stream, that petitioner can obtain water for irrigation of its District lands. The petitioner's whole irrigation district is threatened with destruction if appropriators with junior priority dates, having diversion points above petitioner's head gate in Wyoming, are permitted by Wyoming officials and Wyoming Courts to disregard the senior priority of petitioner's adjudicated water right and take water that would otherwise be available for diversion and beneficial use by petitioner in priority order to the extent of its need and within its maximum adjudication.

Intentional disregard of Wyoming constitutional provisions and Wyoming statutes means that the 14,000 acres of highly developed crop lands which produce maximum yields of beets, small grain, corn, and grasses can no longer be profitably farmed. The productive value per acre will

shrink from \$175.00 per acre per year to the status of dry land farms with a productive value of \$25.00 per acre per year. There is no other source of water supply; and farm lands of the aggregate value of more than two million dollars, with an annual production value of more than a million dollars, will be destroyed if the Wyoming Supreme Court be not required by appropriate mandate to protect petitioner's water right priority against Wyoming junior appropriators permitted by Wyoming officials to disregard petitioner's priority. See *Home Ins. Co., et al. v. C. J. Dick, et al.*, 281 U. S. 397, 74 L. Ed. 926. The Wyoming Court has denied protection to petitioner and has renounced its power to protect petitioner's property right secured by the Constitution of the United States and the Constitution of Wyoming. The decree of the Wyoming Courts disregards petitioner's substantial property right acquired under Federal Law, prior to Wyoming Statehood.

E

JURISDICTIONAL STATEMENT

Basis of jurisdiction relied upon by petitioner:

Petitioner bases its request for the issuance of a writ of certiorari directed to the Supreme Court of the State of Wyoming upon the fact that a final decree has been rendered by the highest Court in Wyoming, in which a decision could be had, wherein petitioner claimed a title, right, and privilege under the Constitution of the United States, which has been denied by the decree of the Wyoming Supreme Court. The attention of the Wyoming Courts was challenged to petitioner's constitutional claim from the beginning.

Petitioner first brought to the attention of the Wyoming trial court its claim under both the Wyoming and United States Constitution in its pleadings, (Rec. 8).

Petitioner brought to the attention of the Wyoming Supreme Court its claims under the State and Federal Constitutions in its assignments of error on appeal (R. 43).

Petitioner's claim under the due process clause of the Federal Constitution was raised by assignment of error to Wyoming Supreme Court, (Rec. 8), the 14th Amendment to the Constitution of the United States was again specifically brought to the attention of the Wyoming Supreme Court by assignment of error in its petition for rehearing, (Rec.

page 197, paragraph 7), pursuant to Rule 23 of the Wyoming Supreme Court, which provides:

"APPLICATION FOR REHEARING:

Application for rehearing of any cause shall be by petition to the court, signed by counsel, briefly stating the points wherein it is alleged that the court has erred. Such petition shall be filed within thirty days after the decision is rendered and shall be accompanied by a brief (five copies of which shall be filed) of the points and authorities relied on in support thereof; but there shall be no oral argument, on petitions for rehearing, unless such argument is requested by the court."

in which petition was specifically assigned the following error committed by the Wyoming Supreme Court in its decree, Paragraph 7, (R. 197):

"In that said judgment and decree results in the State of Wyoming in depriving appellant of a vested property right without due process of law and in denying appellant the equal protection of the law within the jurisdiction of the Wyoming court as provided by the 14th Amendment to the Constitution of the United States."

And in error No. 8, as assigned in said petition for rehearing:

"In refusing to protect the appellant in the full, proper and legal use and enjoyment of a vested substantial property acquired under sanction of national law, entitled to be protected and made secure and available to the appellant under the Constitution of the United States, under the Constitution of the State of Wyoming, under the statutes of Wyoming, and under the decision of the Supreme Court of Wyoming in construing these statutes."

Petitioner's title right and privilege claimed under the Constitution of the United States, on the authority of the *Great Northern Railway Company v. Sunburst Oil and Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, and *Brinkerhoff-Faris Trust and Savings Company v. Walter O. Hill*, 281 U. S. 673, 74 L. Ed. 1107, was timely.

The attention of the Wyoming Courts was promptly challenged, that petitioner was claiming a right under Federal Law, in the allegations (Rec. 1) of its petition that its water right was a Territorial Water Right acquired by compliance with Federal Law. See *Howell v. Johnson, et al.*, 89 Fed. 556.

Under Rule 24, W. S. C., a decision of that Court is not final until petition for rehearing is disposed of.

"APPLICATION SUSPENDS PROCEEDINGS.

The filing of petition for re-hearing within the time aforesaid shall suspend proceedings under the decision until the petition is disposed of unless the court, or one of the justices in vacation, shall otherwise order."

Petitioner's claim of right and privilege under Article 4, Section 1 of the Constitution of the United States was presented to the Wyoming Supreme Court (Rec. 43) by assignment of error and was specifically urged before the Wyoming Supreme Court (Rec. 43) where petitioner assigned the following error for consideration by the Wyoming Supreme Court:

"d. In that said judgment is in violation of Article 4, Section 1, of the Constitution of the United States extending full faith and credit to the public act, record, and judicial proceedings of the State of Nebraska in adjudicating through its Department of Roads and Irrigation, Water Power and Drainage on November 27, 1940, the plaintiffs and appellant's appropriation of water from the natural flow of the North Platte River."

The Wyoming courts ruled on petitioner's claim, and the decision was against petitioner's Federal guarantees.

Authorities submitted in support of application for the issuance of writ of certiorari:

Judicial Code Section 237 Amended, Title 28, Section 344, Paragraph B, U. S. C. A.

Rosalyn Zucht v. W. A. King, et al., 260 U. S. Rept. P. 174, 67 L. Ed. 194.

Corporation Commission of State of Oklahoma, et al. v. William Lowe, 281 U. S. Rept. 431, 74 L. Ed. 945.

Edgar Smith v. State of Texas, 311 U. S. Rept. 128, 85 L. Ed. 84.

Alice Lee Grosjean v. American Express Company, 279 U. S. Rept. 233, 80 L. Ed. 660.

Thomas M. Lynch, et al., as Tax Commissioners of the State of New York v. People of the State of New York upon the Relation of Elizabeth Pierson, 293 U. S. 52, 79 L. Ed. 191.

Thomas P. Crowell v. John Randell, Richard Shoemaker v. John Randell, 35 U. S. 368, 9 L. Ed. 458.

Live Oak Water Users' Association, et al. v. Railroad Commission of the State of California, et al., 269 U. S. 354, 70 L. Ed. 305.

R. S. Sterling, et al. v. E. Constantin, et al., 287 U. S. 378-404, 77 L. Ed. 375.

The decision of the Wyoming Court does not rest upon local law, but exclusively on a Federal question. The opinion of the Wyoming Supreme Court, reported 136 P. (2d) 502, (Rec. 175), may leave the reader with the impression that the issue submitted was properly disposed of on non-federal ground, but an examination of the record will remove that impression.

F

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT OF CERTIORARI

1. The decree of the Wyoming Supreme Court results in unjust, intentional, arbitrary, and unlawful discrimination between petitioner and others, who are all situated in identical circumstances, except petitioner is a citizen of Nebraska, while all junior appropriators are Wyoming citizens, in violation of Article 4, Section 2, Constitution of the United States and denies petitioner equal protection of law for its property within the jurisdiction of the State of Wyoming, and deprives petitioner of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States.

2. The decree of the Wyoming Supreme Court violates the right, title, and privilege of petitioner, protected under the 14th Amendment to the Constitution of the United States, to have appropriated water of the North Platte River in Wyoming diverted only in strict priority order when the supply is not sufficient to satisfy all legal demands therefor.

3. The decree of the Wyoming Supreme Court results in discrimination against petitioner, forbidden by the 14th Amendment to the Constitution of the United States, in that it results in the unlawful injury and destruction and taking of petitioner's vested substantial property right without due process of law.

There is wanting any non-federal grounds upon which to rest the decision of the Wyoming Supreme Court. The only issue presented to the Wyoming Courts for decision and the only issue decided was whether or not, as a matter of law, the respondent could be required to comply with Wyoming Law and regulate head gates of all ditches and canals diverting water from the channel of the North Platte River in District 14, Division 1, in Wyoming under Wyoming adjudicated water rights and permit diversions only in strict order of priority at times when the available supply is insufficient to satisfy all lawful demands therefor, regardless of whether the diverted water is to be beneficially used in Wyoming or in Nebraska, or can the constitutional right of petitioner, a citizen of Nebraska, be disregarded solely because the water diverted by petitioner is conveyed in its canal into the State of Nebraska and there used to irrigate Nebraska lands? The decision was against petitioner's constitutional title, right, and privilege, resulting in the total destruction of petitioner's valuable vested property right, as its water right, without protection of its priority, is valueless.

Your petitioner appends hereto its brief in support of its petition.

G

PRAYER

WHEREFORE, your petitioner, the Mitchell Irrigation District, respectfully prays that a writ of certiorari issue to review the decree of the Supreme Court of the State of Wyoming in the above entitled case.

Respectfully submitted,

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